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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1514

JOHN L. STERR,

Petitioner,

vs.

DAVID B. KELLY, Superintendent,
DIVISION OF STATE POLICE OF
THE STATE OF NEW JERSEY

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

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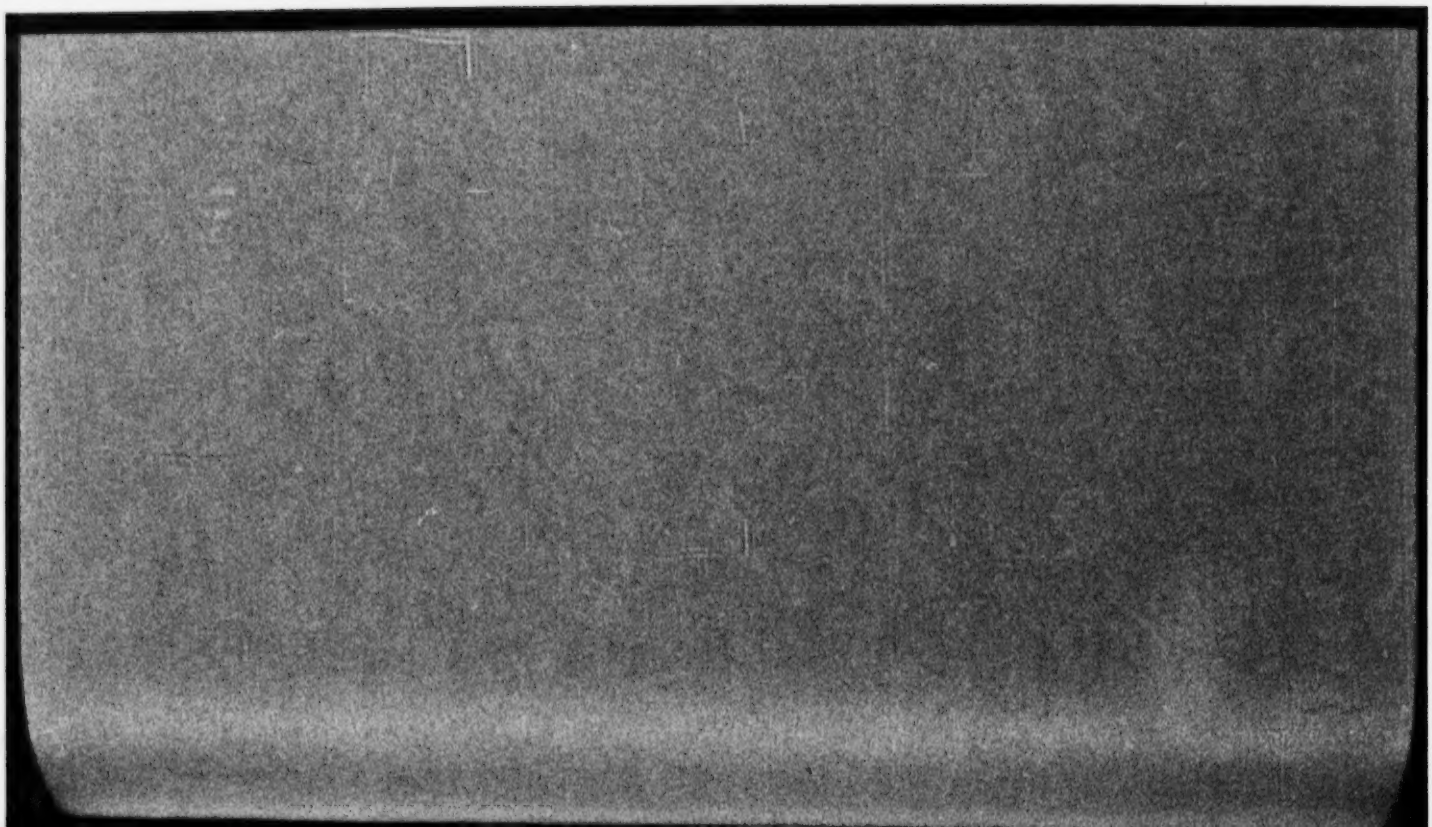

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COUNTER-STATEMENT OF JURISDICTION

This Court must deny the petition for certification since it is without jurisdiction under 28 *U.S.C.* §1257 (2) or (3) to consider the question petitioner now seeks to raise in this Court.

In pertinent parts 28 *U.S.C.* §1257 provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its

being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a . . . state statute is drawn in question on the ground of its being repugnant to the constitution . . . or where any . . . right . . . is specially set up or claimed under the Constitution . . . (of) the United States."

It is clear beyond cavil that in bringing this matter before the New Jersey Supreme Court, petitioner neither drew "in(to) question . . . the validity of a state statute . . . on the ground of it being repugnant to the Constitution . . . of the United States"; nor ". . . specially set up or claimed . . ." any right ". . . under the Constitution . . . (of) the United States."

No federal Constitutional question was properly raised by petitioner in seeking certification by the New Jersey Supreme Court. No such question was decided by that Court, which instead was only called upon to decide and only decided that *N.J. Const., Art.* I, par. 10, did not require a public court martial proceeding. Petitioner refers (Pet. for Cert., p.2) to his "petition for certification to the New Jersey Supreme Court (p.3)" as raising the federal question. A perusal of that page reveals that only New Jersey authorities are cited; *viz: Penn R.R. Co. v. N.J. State Aviation Comm.*, 2 *N.J.*, 64 (1949); *In re Plainfield-Union Water Co.*, 11 *N.J.* 382 (1953); *Juzek v. Hackensack Water Company*, 48 *N.J.* 302 (1966). These cases on the one hand relate only to matters of State administrative law, and on the other hand, are totally irrelevant to the question of the right to a public hearing.

Petitioner's actual sole "constitutional" argument to the New Jersey Supreme Court ran as follows:

"The New Jersey Constitution, Article I, Par. 10 guarantees the right to a public trial in criminal prosecutions. Appellant (Sterr) recognizes (sic) (i.e., argues) was penal (sic), rather than criminal, in nature. However, it was conducted in substance as a military courtmartial would be conducted and in fact very similar to a criminal prosecution.

> "In *State v. Haskins*, 38 *N.J. Super.* 250 (App. Div. 1955), a reversal was granted because of denial of a public trial (in a criminal prosecution). The court held that this denial was plain error and listed reasons supporting the right, including gross abuses of judicial power or judicial arbitrariness as well as exposing witness to public scrutiny." (Petition for Cert. to N.J. Sup. Ct., p.4).

The New Jersey Supreme Court held the foregoing argument as to *N.J. Const., Art.* I, par. 10 to be "without merit." (Pa2).

Most respectfully, it seems apparent that this Court is without jurisdiction to hear the matter on petition for certiorari for it is plain the final justment of the Supreme Court of New Jersey turned exclusively on a question of State constitutional law.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Is not this Court without jurisdiction to review the final judgment of a state court which was based upon an interpretation of the constitution of that state?

COUNTER-STATEMENT OF CONSTITUTIONAL PROVISIONS INVOLVED

No Federal Constitutional provisions are properly implicated in this matter.

COUNTER-STATEMENT OF THE CASE

The facts of the incident which gave rise to the State Police disciplinary proceedings against the petitioner were not in dispute at the hearing and are adequately synopsized by petitioner. (Pet. pp. 3-4). The hearing itself was almost exclusively devoted to determining the meaning of the pertinent state police regulations involved. Thus the only testimony involved was from State Police officers and offered in interpretation of such regulations. The character of the proceedings was essentially "law" finding rather than "fact" finding since the facts were not contraverted.

Nonetheless, and in spite of State Police efforts to keep the fact of the proceeding itself and the identity of the trooper involved confidential, partisans of petitioner succeeded in "trying the matter in the press," as exemplified by the series of newspapers set forth in respondent's supplemental appendix* to the New Jersey Supreme Court. (Rsa9). Indeed, in the course of this litigation, petitioner, or his partisans, succeeded in* generating an extraordinary amount of sympathetic newspaper publicity, particularly remarkable in view of the fact that the upshot of the whole affair was a ten day suspension from duty.

The public, through "leaks" on behalf of petitioner, was made aware by newspapers of virtually everything which went on both inside and outside of the hearings, and throughout that coverage, two somewhat inconsistent themes were trumpeted: (a) that petitioner was being used as a public "scapegoat" or "fall guy" to absorb public indignation due the entire State Police as an organization for its failure to solve the Davis-Perry murder,* &

* See particularly the following articles set forth in respondent's supplemental appendix to the brief filed in the New Jersey Supreme Court and made part of the record herein:
(1) "Is Accused Trooper a Scapegoat in Unsolved Murder," *Phila. Inquirer*, Jan. 4, 1971, p. 21. (Rsa 2 to 3).
(2) "State Police Accused of Trooper Scapegoat Campaign," *Phila. Inquirer*, Jan. 10, 1971, pp. 1,6. (Rsa 4 to 5).
(3) "Trooper Bares New Facts," *Atlantic City Press*, Jan. 14, 1971. (Rsa 6).
(4) "Jersey Shore Trooper Suspended for Shore Murder Violation," *Trenton Sunday Times*, May 9, 1971. (Rsa7).

* E.g., the following:

(1) "Trooper Bares New Facts," *Atlantic City Press*, Jan. 14, 1972. (Rsa6).
(2) "Secret State Police Court Clears Sergeant in Slaying Clue Delay," *Phila. Inquirer*, Sept. 5, 1971. (Rsa8).
(3) "Lawyer Calls Trooper 'Scapegoat,' " *Newark Star Ledger*, May 17, 1972. (Rsa9).

alternatively, (b) that "star chamber" procedures were being employed in this matter and were being generally perpetuated by the powers that be in the State Police because they would conduce to this and similar exercises of alleged "command influence."

As a matter of general policy in this and any similar proceeding, certain procedures were followed:

(a) No disclosures regarding the identity of defendant, the pendancy of the charges against him or their eventual disposition were made by any personnel as spokesman for the State Police. Within the State Police, all personnel, including the defendant and any others involved in the proceeding were under strict orders to keep the matter entirely confidential, and it appears there were no "leaks" from official sources, which consistently refused comment on the matter.

(b) Defendant was represented by counsel, was entitled to call witnesses in his own behalf and accorded all of the rights thought to comport with "administrative due process." Defense counsel himself termed the conduct of the hearing by Capt. Geroge Quinn, "extremely objective."

(c) Defendant was tried before a Summary Court Martial. Unlike a General Court Martial such a body has no power to dismiss a trooper and is empowered to impose no more than a suspension and loss of pay for three months. *N.J. State Police Rules and Regulations,* §17(5) (c).

(d) Access to the "standing orders" and procedures issued by the State Police, which include those defendant was charged with violating, are themselves generally "restricted" to members of the Department and include several orders and procedures which are regarded as "confidential information." For this reason, the State sought to limit discovery in this case.

It is also worth noting that State Police Troopers are not covered by Civil Service.

The "unsworn letter from the Superintendent of the State Police," to which petitioner makes reference (Pet. for Cert., p.5) was not as petitioner implies, some sort of *ex parte* communication to the court. In fact, that letter was not directed to the court at all. Rather, the letter was sent to the undersigned. The undersigned, in a supplemental letter memorandum to the Court, incorporated therin the Superintendent's letter outlining the historical and practical basis of the closed hearing policy.

Copies of both the undersigned's letter memorandum and the incorporated-by-reference letter from Superintendent Kelly to the undersigned were served upon petitioner prior to the New Jersey Supreme Court's decision. Indeed, petitioner filed a full-dress memorandum responding point by point to the Superintendent's letter.

REASONS FOR DENYING THE WRIT

POINT I

JUST AS THE NEW JERSEY SUPREME COURT HELD THERE IS NO RIGHT UNDER THE NEW JERSEY CONSTITUTION TO HAVE A STATE POLICE DISCIPLINARY PROCEEDING HELD PUBLICLY, NOR IS THERE ANY SUCH RIGHT UNDER THE FEDERAL CONSTITUTION.

It seems that after fruitlessly relying before the New Jersey Supreme Court upon *N.J. Const., Art.,* I, par 10 which guarantees to a *criminally accused* the right to a "speedy and public trial" in "all criminal prosecutions," petitioner is now relying upon the Fifth and Fourteenth Amendments to the Federal Constitutions as the basis for his putative right to have a State Police disciplinary proceeding made public.

In support of this contention, he musters one decision, *Fitzgerald v. Hampton,* 467 *F.2d* 755 (D.C.Cir. 1972), which he offhandedly claims was "overlooked" by the New Jersey Supreme Court. In point of fact, the Fitzgerald case was not reported until after the Supreme Court of New Jersey handed down its decision. Moreover, petitioner never brought the *Fitzgerald* case to the attention of that court. Unless clairvoyance may be presumed on the part of the court, it is grossly errant to charge that it "overlooked" *Fitzgerald.*

But in any event, even if *Fitzgerald* had been before the New Jersey Supreme Court it would have made no difference for that case itself it clearly spells out why someone in petitioner's situation has no right to a public disciplinary hearing, whereas one situated as was *Fitzgerald* would have such a right.

First of all, *Fitzgerald* was decided under a *federal,* Fifth Amendment standard, applicable only to federal agencies, which has not be applied to *state* agencies governed by the Fourteenth Amendment.

More critically, *Fritzgerald* turns on the fact that - "Fitzgerald's employment (was) under legislative protection. The vehicle is the Veteran's Preference Act." 467 *F.2d,* at 762. In other words, by statute, he was given special rights by virtue of being a veteran, not available to ordinary employees, and it was

these *special* rights which the court found as being within the "liberty and property concept of the Fifth Amendment." *Ibid.*

Sterr on the other hand, does not even enjoy civil service status as a state trooper, or anything other than limited tenure rights. *State Troopers Fraternal Ass'n v. State v. New Jersey, et al.*, 62 *N.J.* ———— (Decided 3/15/73); *cf. Dunbar v. Kelly*, 114 *N.J. Super.* 453 (App. Div. 1971); *In re Bernaducci*, 85 *N.J. Super.* 152 (App. Div. 1964); As *Fitzgerald* notes, *id.*, 467 *F.2d*, at 761 *Vitarelli v. Seaton*, 359 *U.S.* 535 (1969) is dispositive in such a situation.

The hearing rights Sterr has as a trooper may be analogized to those given by Congressional or agency grace, as discussed in *Fitzgerald, supra*, 467 *F.2d* at 761, which obtain where no specially protected employment interest is involved. *Cafeteria & Rest. Workers v. McElroy*, 367 *U.S.* 886 (1961). They are not "liberty" or "property" within the meaning of the due process clause.

It should also be noted that all of these cases including *Fitzgerald* involved matters of gravity—*i.e.*, dismissal, in some cases tantamount to disqualifying the employee from any further employment in his chosen profession. This case involves only a ten day suspension from duty, imposed purely as a matter of internal discipline. The only public obloquy involved has ensued as a result of publicity of the matter by Sterr's own partisans.

Another consideration upon which *Fitzgerald, supra*, at 762, turned was the absence there of any "security reasons" militating in favor of certain procedures, *i.e.*, *Vitarelli v. Seaton, supra; Cafeteria Workers, supra.* Here the New Jersey Supreme Court in its decision amply documented the security problems and considerations relating to internal discipline as well as public confidence in the State Police which mandate the private hearing format. (Pa4 to 5).

Apart from *Fitzgerald*, petitioner has not attempted to summon any support for his position, undoubtedly because there is no such support to be found. However, considerable authority indicates the wisdom of allowing an agency an option on the closed versus the open format question. A recent case has aptly summarized the relevant concerns in a situation where matters of far greater gravity were involved:

"The fact that the 'public' was not allowed to attend the meetings before the State Board in no way tends to establish bias or unfairness in those proceedings. No citation of authority has been submitted, and indeed there is none, which necessitates a public hearing in such matters. Indeed, for the benefit of the reputation of the students involved, where they were strongly represented by able counsel, and given the widest possible latitude, it would seem more fitting to allow charges and defenses to be made before the Board itself, not as a 'Star Chamber' proceeding but in a genuine effort to *protect the students against unwanted and probably inaccurate news reporting.*" *Zanders v. La. State Board of Ed.*, 281 F.*Supp.* 746, 768 (W.D. La. 1968); Accord *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 *F.Supp.* 725 (M.D.Ala. 1968).

Finally, it should be noted that it is the public notoriety he has allegedly suffered which the defendant finds the most grating aspect of the entire episode. Such notoriety could have been entirely avoided if defendant's partisans had resisted the opportunity to make public his identity, the nature of the charges and finally their disposition, in the face of the Department's policy of keeping such matters strictly internal and confidential. Neither the problem here nor the suggested solutions are in any way unique. But time and again, the weight of authority has come out on the side of resisting the nearly ritualistic demand for public hearings, recognizing that -

"(t)o make the hearing public would result in public notoriety for all persons against whom charges were heard and also for the witness. The justification for failure to confront charged employees would be greatly strengthened, in this delicate matter of inquiry into reputation and personality, if witnesses not only were required to confront the employee but the confrontation and cross-examination were to take place in public. The committee sees it as unavoidable that having open hearings would tend to lessen the amount of confrontation afforded."

Report of the Special Comm. of the Fed. Loyalty - Security Program of the Ass'n of the Bar of the City of New York, p. 173 (1956).

Precisely the same point was made in the New Jersey Supreme Court's opinion. (Pa4).

Finally, it is self-evident that petitioner's situation does not come within the "public trial" guarantee of the Sixth Amendment, a point he does not urge upon this Court. *Cf. Dressler v. Wilson*, 155 *F.Supp.* 373 (1957).

CONCLUSION

For all of the foregoing reasons, it is respectfully urged that the petition of John L. Sterr for a writ of certiorari to the Supreme Court of New Jersey should be denied.

Respectfully submitted,

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